Amendment to the United States Constitution; (2) violated the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.*; (3) breached their statutory and fiduciary duties under several other federal statutes; and (4) violated the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* See Pet. App. 11a-12a.

The district court granted the federal respondents' motion to dismiss petitioners' complaint. Pet. App. 10a-22a. The district court rejected petitioners' takings claim, explaining that equitable relief on that cause of action was unavailable because petitioners had not invoked the existing statutory mechanisms to obtain just compensation for the alleged takings. *Id.* at 12a-13a. The court dismissed the ESA claim because petitioners had failed to identify any conduct in which the federal respondents had engaged that could serve as the basis for an action under the ESA. *Id.* at 15a-17a. With respect to petitioners' claims that the federal respondents had breached their obligations under other statutes by failing to implement the FIIP, the district court held that petitioners' claims failed because none of the relevant statutes contained a waiver of the United States' sovereign immunity. *Id.* at 17a-18a, 19a-20a. Finally, the court held that petitioners could not bring suit under the APA to compel the federal respondents to develop an erosion-control plan pursuant to the FINSA. *Id.* at 20a-21a. The court concluded that, because "[t]he DOI and the Corps have discretion as to the best manner to effect the FINSA's mission," *id.* at 20a, those agencies' "inaction with regard to the FIIP is precluded from judicial review," *id.* at 21a.

3. The court of appeals affirmed. Pet. App. 1a-9a. The court held that petitioners' claims were subject to dismissal because petitioners lacked standing to sue. *Id.* at 5a. The court assumed, without deciding, that

petitioners' alleged injuries were actual or imminent. *Id.* at 5a n.1.[3] The court concluded, however, that petitioners could not satisfy the redressability requirement of standing doctrine because the court could "only speculate whether the remedy they seek would redress their purported injuries." *Id.* at 5a. The court of appeals explained:

> [Petitioners] identify no statutory authority that would specifically require [the federal respondents] to adopt the FIIP. Despite [petitioners'] optimism, there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems. Moreover, we recognize that the FIIP is merely an interim plan spanning a five-year period. Accordingly, even were the FIIP successful, at best, it would be terminated and shortly replaced by another program whose chances of success are only speculative at this point in time.

Id. at 5a-6a.

The court of appeals further explained that petitioners' claims under various federal statutes could not go forward because petitioners "identify no duty in any of these statutes that would require [the federal respondents] to act in a manner that would likely redress the injury of which they complain." Pet. App. 6a; see *id.* at 6a-8a. With respect to the WRDA in particular, the court found that, although the statute "contains express provisions for specific action," it does not require "the adoption of any specific plan" or a "*successful* shore

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[3] Petitioners' complaint alleged that groins and stabilization projects previously installed by the federal government had caused or contributed to Fire Island's erosion problems. See C.A. App. A-50 to A-52. Whether that causal link exists is a matter of dispute. See Affidavit of James T.B. Tripp ¶ 11 (Nov. 26, 2001).

erosion plan," and the plan adopted by the relevant federal agencies "need not be acceptable to [petitioners]." *Id.* at 8a. For that reason, the court concluded, the federal respondents' "compliance with the [WRDA] would not necessarily make it likely that any plan adopted and submitted to Congress would remedy Fire Island's shore erosion problem." *Ibid.*

With respect to petitioners' claim that the federal respondents' "failure to prevent shore erosion on Fire Island constitutes a de facto taking," the court of appeals recognized that "the Takings Clause prohibits the government from seizing private property without providing just compensation," and the court left open the possibility that petitioners might be able to obtain a compensation remedy. Pet. App. 9a (internal quotation marks omitted). The court held, however, that petitioners' current takings claims could not go forward, both because petitioners "do not have standing to seek an equitable remedy in this situation," and because petitioners had failed to establish that their potential remedy at law was inadequate. *Ibid.* With respect to the adequacy of petitioners' remedy at law, the court noted that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Id.* at 9a n.3 (quoting *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. In *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), this Court explained that an Article III case or

controversy exists only if (a) the plaintiff "ha[s] suffered an 'injury in fact,'" (b) that injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court," and (c) it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560-561 (citations, brackets, ellipses, and internal quotation marks omitted). Petitioners do not contend that they can establish standing (and, in particular, redressability) under that framework. Rather, petitioners argue (Pet. 13) that their alleged injury is a "procedural" harm, and that the redressability inquiry is therefore governed by a less demanding standard.

Petitioners' contention lacks merit for three reasons. First, the federal respondents' failure to adopt a "plan" to guide their overall Fire Island erosion-control efforts is quite different from the type of procedural violation as to which this Court has held a relaxed standard of redressability to be applicable. Second, even in cases involving alleged violations of procedural requirements, a plaintiff cannot establish standing if, as in this case, it is purely speculative whether the relief sought will remedy or prevent the actual or threatened injury. Finally, petitioners cannot satisfy the redressability requirement in this case because the implementation of any erosion-control plan for Fire Island under the WRDA is contingent on the independent action of the State of New York, and petitioners cannot show that the State will agree to help fund and implement such a plan.

a. The court of appeals assumed, without deciding, that petitioners had sufficiently alleged an actual or imminent injury. Pet. App. 5a n.1. The court held, however, that petitioners could not show that the

alleged injury would be redressed by a favorable judicial ruling because the court could only "speculate" whether an erosion-control plan adopted by the federal respondents would remedy petitioners' harm. *Id.* at 5a. The court found in particular that "there [wa]s no indication that the FIIP would, in fact, remedy Fire Island's erosion problems." *Ibid.* The court further observed that, even if the federal respondents adopted and submitted to Congress an erosion-control plan that was acceptable to the federal agencies involved, the WRDA did not require the adoption of any specific plan, or of a plan that would be successful or acceptable to petitioners. *Id.* at 8a.[4]

b. This Court has held that a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Defenders of Wildlife*, 504 U.S. at 572 n.7. As an example of that principle, the Court stated that "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with

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[4] Indeed, petitioners' complaint alleged that the erosion-control measures purportedly favored by the Department of the Interior—*i.e.*, the acquisition and removal of beachfront properties rather than the structural beach nourishment projects proposed by the Corps (C.A. App. A-57 to A-58)—are "contrary to the intent of Congress and to sound engineering principles" and would not "mitigate the effects of the accelerated erosion and physical invasions caused by the Defendants prior projects." *Id.* at A-57. Thus, petitioners' own allegations demonstrate that it is highly speculative whether the adoption of a shoreline erosion-control plan mutually acceptable to the Corps and the DOI would redress petitioners' harm.

any certainty that the statement will cause the license to be withheld or altered." *Ibid.* The Court in *Defenders of Wildlife* described "the archetypal procedural injury: an agency's failure to prepare a statutorily required environmental impact statement before taking action with potential adverse consequences to the environment." *National Parks Conservation Ass'n* v. *Manson*, No. 04-5327, 2005 WL 1540792, at *3 (D.C. Cir. July 1, 2005) (citing *Defenders of Wildlife*, 504 U.S. at 752 n.7). Almost all of the procedural standing cases on which petitioners rely involved similar challenges to an agency's failure properly to complete an environmental review in accordance with legal requirements.[5] See *Catron County Bd. of Comm'rs* v. *United States Fish & Wildlife Serv.*, 75 F.3d 1429, 1433 (10th Cir. 1996); *Society Hill Towers Owners' Ass'n* v. *Rendell*, 210 F.3d 168, 172-173 (3d Cir. 2000); *Cantrell* v. *City of Long Beach*, 241 F.3d 674, 676-677 (9th Cir.

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[5] Many of the cases on which petitioners rely do not address the question of standing. Those include *In re Bluewater Network*, 234 F.3d 1305 (D.C. Cir. 2000); *Forest Guardians* v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *In re American Rivers & Idaho Rivers United*, 372 F.3d 413 (D.C. Cir. 2004); *Neighbors of Cuddy Mountain* v. *Alexander*, 303 F.3d 1059 (9th Cir. 2002); *In re United Mine Workers*, 190 F.3d 545 (D.C. Cir. 1999); *Marathon Oil Co.* v. *Lujan*, 937 F.2d 498 (10th Cir 1991); *Hercules, Inc.* v. *EPA*, 938 F.2d 276 (D.C. Cir. 1991). Others that address standing do not involve allegations of procedural injury. See *Federal Election Comm'n* v. *Akins*, 524 U.S. 11 (1998) (informational standing); *Bennett* v. *Spear*, 520 U.S. 154 (1997); *United States* v. *Richardson*, 418 U.S. 166 (1974) (taxpayer standing); *National Credit Union Admin.* v. *First Nat'l Bank & Trust Co.*, 522 U.S. 479 (1998) (prudential standing); *Wisconsin* v. *FERC*, 192 F.3d 642 (7th Cir. 1999); *North Shore Gas Co.* v. *EPA*, 930 F.2d 1239 (7th Cir. 1991) (no discussion of procedural standing).

2001); *Committee to Save the Rio Hondo* v. *Lucero*, 102 F.3d 445, 448 (10th Cir. 1996); *Douglas County* v. *Babbitt*, 48 F.3d 1495, 1497-1499 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996); *Florida Audubon Soc'y* v. *Bentsen*, 94 F.3d 658, 662 (D.C. Cir 1996); *Heartwood, Inc.* v. *United States Forest Serv.*, 230 F.3d 947, 950-951 (7th Cir. 2000); *Pye* v. *United States*, 269 F.3d 459, 462-464 (4th Cir. 2001).

The hypothetical situation described in *Defenders of Wildlife* involved a discrete on-the-ground action—construction of a federally licensed dam. See 504 U.S. at 572 n.7. The Court stated that, so long as a plaintiff can demonstrate a likelihood of injury from consummation of the relevant project, he can challenge the proposed action on the ground that the agency's decision-making processes were legally defective, even if he "cannot establish with any certainty" that use of appropriate procedures would have produced a different outcome. *Ibid.* Petitioners' complaint, by contrast, did not focus on specific on-the-ground agency actions, but instead alleged in general terms that the federal respondents had failed to take adequate steps to fulfill their statutory obligations to protect the Fire Island coastline. See, *e.g.*, C.A. App. A-70.

In that respect, petitioners' suit resembles the generalized challenges to overall agency programs that this Court has held to be beyond the scope of judicial authority. See *Norton* v. *Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2378-2384 (2004) (*SUWA*); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). Although petitioners characterize their suit as "an effort to compel 'discrete agency action that [Respondents are] required to take,'" Pet. 12 (quoting *SUWA*, 124 S. Ct. at 2379), the "discrete agency action" to which they refer is not a concrete erosion-control

measure, but rather the adoption of a "plan" pursuant to the WRDA. The gravamen of petitioners' claim is that the adoption of such a plan would alter the federal respondents' overall erosion-control efforts in a way that would be beneficial to petitioners' interests. Nothing in *Defenders of Wildlife* suggests that a plaintiff may bring a claim of this nature without satisfying generally-applicable standards of redressability.

c. Petitioners would not have standing to sue in this case even if their claims were subject to the relaxed redressability requirement that, under *Defenders of Wildlife*, is applicable to claims of "procedural" irregularity. A plaintiff who alleges a procedural violation can assert his claim "without satisfying *all* the normal standards for redressability and immediacy," and he need not "establish with any certainty" that compliance with the relevant procedural requirements would have produced a more favorable outcome. *Defenders of Wildlife*, 504 U.S. at 572 n.7 (emphasis added); cf. *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) (non-constitutional error provides basis for reversal in federal criminal case if appellate court concludes that error affected the outcome or is left in "grave doubt" as to whether such an effect occurred). Nothing in *Defenders of Wildlife* suggests, however, that the redressability requirement is eliminated altogether when the plaintiff alleges a procedural violation. Absent some reasonable prospect that a favorable judicial ruling will prevent or remedy his alleged injury, a plaintiff would lack the "personal stake in the outcome" of the suit, *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962)), that Article III demands.

In the instant case, the court of appeals noted petitioners' failure to identify any provision of law

requiring the federal respondents to take measures that would "likely" address petitioners' asserted harms. See Pet. App. 6a, 7a. The court also stated, however, that it could "only speculate whether the remedy [petitioners] seek would redress their purported injuries" because "there is no indication that the FIIP would, in fact, remedy Fire Island's erosion problems." *Id.* at 5a. There is consequently no reason to suppose that the outcome of this case would have been different if the court of appeals had applied the less demanding standard of redressability applicable to claims of procedural infirmity.

d. When a plaintiff alleges that he has been injured by the unlawful conduct of the federal government, and the effectiveness of a judicial order in alleviating the plaintiff's harm depends on the voluntary choices of non-federal actors, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to * * * permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562; see, *e.g.*, *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 42 (1976); *Allen* v. *Wright*, 468 U.S. 737, 757-758 (1984); *Pritikin* v. *Department of Energy*, 254 F.3d 791, 799-801 (9th Cir. 2001); *US Ecology, Inc.* v. *Department of the Interior*, 231 F.3d 20, 24-25 (D.C. Cir. 2000); *University Med. Ctr.* v. *Shalala*, 173 F.3d 438, 440-442 (D.C. Cir. 1999). Petitioners cannot satisfy that requirement.

Under the Flood Control Act of 1970, Pub. L. No. 91-611, Tit. II, 84 Stat. 1824, and the Water Resources Development Act of 1974, Pub. L. No. 93-251, Tit. I, 84 Stat. 12, implementation of any plan developed by the federal respondents cannot proceed until a non-federal party agrees to fund at least 35% of the project, to maintain and operate any improvements, and to enter

into a written agreement to comply with those requirements. See pp. 3-4, *supra*. The allegations of petitioners' own complaint suggest that the State of New York is unlikely to agree to participate in the FIIP that petitioners seek to have adopted. Petitioners' complaint alleged that the State's Department of Environmental Conservation and Department of State "acted individually and in concert [with the United States Department of the Interior] to prevent bringing the review process [for the FIIP] to closure." C.A. App. A-57. The complaint further alleged that the "State agency defendants have continued to delay responses [to the draft FIIP]," primarily because the Department of State "supports the DOI's objective of removing the over 300 houses in the dune areas before any breach [sic] nourishment takes place." *Id.* at A-60. The complaint also alleged that the state agencies have "frustrated the Corps' efforts to bring the FIIP to fruition," including by refusing to submit formal comments on the FIIP DEIS. *Id.* at A-60 to A-61. Those allegations are inconsistent with any contention that New York officials are likely to exercise their own discretionary authority in a manner that would permit redress of petitioners' injuries through a judicial order directed at the federal respondents.[6]

2. Petitioners contend that this Court should grant review to "clarify that district courts are not cate-

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[6] Although petitioners' complaint sought an injunction compelling New York officials to cooperate with the federal respondents (see C.A. App. A-73), petitioners' claims against the state defendants were dismissed by the district court, and that ruling was affirmed by the court of appeals. In this Court, petitioners do not seek review of any question concerning the discretion of state officials to decline to approve or participate in a WRDA plan deemed mutually acceptable by the relevant federal agencies.

gorically barred from entertaining suits for declaratory or injunctive relief under the Takings Clause." Pet. 26 (capitalization omitted). The question whether such suits are "categorically barred" is not presented in this case, and the court of appeals correctly held that petitioners' takings claim could not go forward.

a. The court of appeals explained that petitioners' takings claim was properly dismissed in part because petitioners "do not have standing to seek an equitable remedy in this situation." Pet. App. 9a. That holding is correct for the reasons stated above. See pp. 9-15, *supra*. Regardless of the source of law on which a plaintiff's claim is based, a federal court may entertain a suit for equitable relief only if the plaintiff can establish a sufficient probability that a favorable judicial ruling would redress its injury. That limitation on the federal judicial power provides an adequate and independent ground for dismissal of petitioners' takings claim.

b. As an additional basis for affirming the dismissal of petitioners' takings claim, the court of appeals stated that petitioners had failed to demonstrate the inadequacy of their remedy at law, Pet. App. 9a, and it explained that "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," *id.* at 9a n.3 (quoting *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990)). The court of appeals did not purport to announce a categorical bar to equitable relief in takings cases, but simply (and accurately) described the general rule articulated in a number of this Court's decisions. Because the Just Compensation Clause does not "limit the governmental interference with property rights per se, but rather * * * secure[s] compensation in the event of otherwise proper interference amounting to a taking," *First English Evangelical Lutheran Church* v.

County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis omitted), the Clause is not violated unless the government takes private property while refusing to compensate the owner. For that reason, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus* v. *Monsanto*, 467 U.S. 986, 1016 (1984) (footnote omitted); see *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985). "If the government has provided an adequate process for obtaining compensation, and if resort to that process yield[s] just compensation, then the property owner has no claim against the Government for a taking." *Preseault*, 494 U.S. at 11 (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194-195 (1985)).

A plaintiff who alleges a taking of property by the United States may generally seek just compensation under the Tucker Act, which confers jurisdiction on the Court of Federal Claims "to render judgment upon any claim against the United States founded * * * upon the Constitution." 28 U.S.C. 1491(a)(1); see *Monsanto*, 467 U.S. at 1016 & n.20. Thus, even when federal agency action effects a taking of property, that action cannot be deemed unconstitutional, and equitable relief is inappropriate, unless the plaintiff can demonstrate that Congress has withdrawn the Tucker Act remedy. See *Preseault*, 494 U.S. at 11-12. This Court has consistently presumed, moreover, that the Tucker Act remedy remains available in takings cases unless Congress has clearly manifested its intent to withdraw that remedy for a particular category of claims. See *id.* at 12. The court of appeals' holding that petitioners had

failed to establish the inadequacy of their legal remedies is thus fully consistent with this Court's precedents.[7]

c. Petitioners contend (Pet. 29) that injunctive relief is appropriate because the "core" of their takings claim "is that the taking is *unauthorized*—and indeed forbidden by—Congress." Petitioners rely (Pet. 29) on a provision of the Fire Island National Seashore Act, 16 U.S.C. 459e-1(e), which states that the Secretary of the Interior "shall not acquire any privately owned improved property or interests therein within the boundaries of the seashore * * * without the consent of the owners." But while petitioners' complaint alleged that the federal respondents' conduct has caused damage to petitioners' oceanfront tracts, thereby effecting "*de facto* takings of [petitioners'] properties" (C.A. App. A-64), proof of those allegations

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[7] Petitioners' reliance (Pet. 27-28) on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), is misplaced. The plurality in *Eastern Enterprises* acknowledged the general rule that "the availability of a Tucker Act remedy renders premature any takings claim in federal district court." *Id.* at 521. The Court concluded, however, that Congress could not have intended the Tucker Act remedy to apply in the particular circumstances of that case, where the alleged taking resulted from a statute requiring the plaintiffs to make a stream of payments to another party. Rather, the Court found that the "'presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds' mandated by the government." *Ibid.* (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.), cert. denied, 516 U.S. 913 (1995)). Because petitioners' takings claim is based not on a mandate to make a direct transfer of funds, but on the burden that the federal respondents have allegedly imposed on their "beachfront property" (Pet. 26), the reasoning of *Eastern Enterprises* does not apply here.

would not establish that the Secretary had "acquire[d]" the relevant lands within the meaning of 16 U.S.C. 459e-1(e). Petitioners' complaint did not allege a violation of Section 459e-1(e), and neither the district court nor the court of appeals discussed that provision. Petitioners' statutory claim therefore does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

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Petitioners,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, GALE NORTON, SECRETARY OF INTERIOR, MICHAEL T. REYNOLDS, SUPERINTENDENT OF THE FIRE ISLAND NATIONAL SEASHORE, UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, CARL A. STROCK, CHIEF OF ENGINEERS, U.S. ARMY CORPS OF ENGINEERS, RANDY L. DANIELS, SECRETARY, NEW YORK STATE DEPARTMENT OF STATE, and DENISE M. SHEEHAN, ACTING COMMISSIONER, STATE OF NEW YORK, DEPARTMENT OF ENVIRONMENTAL CONSERVATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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In the decision below, the Second Circuit held that the federal courts are without power to entertain claims (1) to compel agency compliance with specific statutory commands, brought, under the Administrative Procedure Act, by the very citizens the statute was intended to benefit; (2) for equitable relief under the Takings Clause, in circumstances where the remedy of monetary compensation after acquisition is not adequate, congressionally intended, or constitutionally "just."

As explained in the petition, these rulings reflect the widespread uncertainty, confusion, and conflict in the lower federal courts concerning (1) the nature of the modified Article III standing test for "procedural rights" cases, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 & nn. 7, 8 (1992), and (2) the circumstances under which the availability of a post-deprivation monetary remedy should preclude district court jurisdiction over Takings claims.

Respondents' Brief in Opposition does not seriously dispute that these questions have divided the lower courts (and this Court, see *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)), nor does it deny that they are important questions of federal law. Rather, Respondents largely argue that the questions were resolved correctly below. That would not be a strong ground for denying review in any event, and, as we show, the Second Circuit's decision was seriously wrong on its merits.

1. The Brief in Opposition is remarkably reticent about the violation of the clear, specific, and mandatory congressional command that is at the heart of this case. Section 342 of the Water Resources Development Act of 1999, Pub. L. 106-53, "direct[s]" the federal Respondents to "complete all procedures and reviews expeditiously and to adopt and submit to Congress, not later than 120 days after enactment of this Act, a mutually acceptable shore erosion plan" for Fire Island. Its enactment was a direct response to a pattern of bureaucratic recalcitrance (see Pet. 3-8), in the face of serious threats to those (including Petitioners) who reside on and visit Fire Island and those on

Long Island's South Shore who depend on it for protection against coastal flooding.

Respondents do not (and could not) deny that the agencies failed to adopt a shore erosion plan as required by Section 342, but neither do they acknowledge or try to explain the agencies' default. Rather, the brief makes a single, passing reference to the agencies' "deci[sion] not to proceed with the FIIP" (Opp. 5), the oft-delayed erosion-control undertaking whose non-completion had prompted Congress to command the agencies to take action, once and for all, by a date certain.

a. As we demonstrated (Pet. 25-26), federal courts have always been open to parties aggrieved by an agency's failure to perform actions "specifically and unequivocally commanded" by Congress, *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 2373, 2379 (2004) ("*SUWA*"). Under our constitutional system, agencies are not free to "decide," like Bartleby the Scrivener, not to comply with the law: "'The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases.'" *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946)).

Indeed, judicial review of agency action exists to address just this kind of disregard for the duly enacted will of Congress. The central purpose of the APA review provisions was "to give the courts a tool with which they could force the agency to act according to congressional will," Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines under Section 706(1)*, 42 WM. & MARY L. REV. 1545, 1549 (2001); *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (noting that "basic presumption of judicial review" was "reinforced" by the APA); Lehner, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 689 (1983) ("Judicial review of agency nonimplementation of a statute is both necessary and proper to give effect to the congressional intent and to assure the legitimacy of the administrative system").

Indeed, even when the default is the relatively venial one of a delay in meeting a statutory deadline, rather than, as here, an outright refusal to execute a mandatory duty, courts have not treated agency officials' claims that a statute might prove ineffective at achieving its ultimate policy goals as a reason to deny aggrieved individuals standing to enforce it. Such an argument, accepted below, creates an obvious moral hazard for agencies facing inconvenient or unwelcome statutory mandates.

Defenders of Wildlife recognized that "redressability" objections of this sort do not bar APA suits alleging noncompliance with procedural mandates designed to protect plaintiffs' concrete interests, 504 U.S. at 572-73 & nn. 7, 8 – and that at the motion to dismiss stage, plaintiffs' submissions on standing are entitled to the benefit of all reasonable inferences and the assumption of specific support for general allegations, *id.* at 561.

2. As our petition demonstrated, the Second Circuit's reasoning implicates a conflict among the courts of appeals as to the nature of the Article III standing analysis under *Defenders of Wildlife* footnotes. Respondents do not dispute this division of authority, and for good reason. See, *e.g.*, *Committee to Save the Rio Hondo v. Lucero*, 102 F. 2d 445, 451 (10th Cir. 1996) (expressly rejecting, as overly restrictive, the redressability standard embraced by the D.C. Circuit in a sharply divided en banc decision in *Fla. Audubon Soc'y v. Benson*, 94 F.3d 658, 667 (1996)); Pet. 20-24.

Rather, Respondents (Opp. 11-14) suggest that the rules recognized in *Defenders of Wildlife* might apply only in "environmental review" statutes, and that Petitioners' likelihood of obtaining redress from a judicial ordering compliance with Section 342 is somehow more "speculative" than in the hypothetical NEPA case discussed in *Defenders of Wildlife*.

a. There is nothing in this Court's discussion in *Defenders of Wildlife* that supports a subject-matter limitation to

procedural standing, and the decisions of the courts of appeals are to the contrary.[1] As we showed (Pet. 14-24), the Second Circuit's decision implicates the same problem raised in those cases, namely, whether the possibility that an agency, after carrying out procedures mandated by Congress to safeguard interests that plaintiffs share, will reach a decision that does not remedy a plaintiff's injury defeats jurisdiction over an APA suit to compel performance of the legislated procedures. But to the extent the discussion in *Defenders of Wildlife* has left uncertainty as to when the less demanding standard should govern, that would be reason for *granting* review here.

b. If Section 342 differs from the hypothetical "procedural violation" standing addressed in *Defenders*, it differs only in ways that make the case for standing *stronger* here.

i. First, this case arises on a motion to dismiss Petitioners' complaint. Thus, even if it were true that the complaint merely "alleged in general terms that the federal Respondents had failed to take adequate steps to fulfill their statutory obligations to protect the Fire Island coastline" (Opp. 13) – and it is not – Petitioners would be entitled to the benefit of every reasonable inference. See *Defenders of Wildlife,* 504 U.S. at 561.

ii. Second, and consistent with their general disregard for the provision's text and history as a response to specific administrative failures, Respondents overlook the fact that Section 342 itself required the agencies to finish "*all procedures and reviews expeditiously*" – a reference that, read in the context of unfolding administrative proceedings concerning Fire Island's erosion problems, plainly included the

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[1] See, *e.g.*, *Pye v. United States*, 269 F.3d 459, 468 (4th Cir. 2001) (National Historic Preservation Act); *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 176-77 (3d Cir. 2000) (same); *AFGE, Local 2119 v. Cohen*, 171 F.3d 463, 466-67 (7th Cir. 1999) (statutorily mandated cost comparison for reduction in military force); *Electric Power Supply Ass'n v. FERC*, 391 F.3d 1255, 1262 (D.C. Cir. 2004) (statutory prohibition on *ex parte* communications).

then nearly complete NEPA review in connection with the FIIP. If, as Respondents appear to acknowledge, generic procedural obligations like those imposed by NEPA are enforceable by citizen plaintiffs with a concrete interest in the affected land (an interest Respondents appear to concede to Petitioners here, Opp. 9), then a statute mandating expeditious completion of those reviews is *a fortiori* enforceable by those plaintiffs.

iii. Section 342 differs from NEPA and other generic procedural statutes in another way that cuts strongly in Petitioners' favor. It is a narrowly targeted provision that was intended to remedy a specific problem ("shore erosion") involving a particular geographic area (the stretch of seashore "between Fire Island Inlet and Moriches Inlet") and that demands from the agencies a specific response ("a shore erosion plan"). Section 342's specificity readily differentiates this suit from the "generalized challenges to overall agency programs" that Respondents, surprisingly (Opp. 12), claim it to resemble.[2] Doctrine aside, it strains common sense to deny a person threatened with having his land washed away standing to enforce a congressional "direction" to federal officials to adopt a "shore erosion plan" targeting the threatened area.

Respondents do not dispute that Petitioners were the proponents and intended beneficiaries of Section 342, nor that Petitioners, of all people, have a concrete and particularized interest in the agencies' "deci[sion]" not to comply with the provision. And they do not identify any *other* party who would have standing to challenge the agency's wholesale disregard for

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[2] See *SUWA*, 124 S. Ct. at 2380-81 (holding unreviewable plaintiffs' claim that agencies had violated mandate to "'manage [Wilderness Study Areas] * * * so as not to impair the[ir] suitability for preservation as wilderness'" 43 U.S.C. 1782(c)). Notably, *SUWA* did not hold that plaintiffs lacked *standing*.

Section 342.[3]

c. Section 342 itself should suffice to defeat the objection that it remains "purely speculative" (Opp. 9) whether an order requiring compliance by the agencies would address Petitioners' injury. The statute reflects a determination *by Congress* that the "adoption" of a "shore erosion plan" developed by the Corps of Engineers – one elaborate exemplar of which was before Congress in August 1999 in the form of the then nearly complete FIIP, see Pet. at 20 n.9 – would serve as at least a partial remedy for the ongoing threat to Fire Island. It is not "speculative" to conclude, following Congress, that a "shore erosion plan" developed by the Nation's foremost engineering agency will benefit those threatened by *shore erosion* in the very area covered by the plan.

Respondents do not cite any authority for the proposition that *Defenders of Wildlife* imposed a "reasonable prospect" of ultimate redress requirement (p.13) in procedural rights cases; as the petition explains (pp. 21-22), several courts of appeals have held that the probability that injury will or will not ultimately be averted has no place in the analysis. And even without benefit of the indulgent standards for Rule 12(b)(6) motions, the likelihood of concrete relief for Petitioners is at least as great as in the typical NEPA case, where there is always the possibility that the agency will decide to proceed with the project after environmental review is complete, without adopting any of the mitigation measures sought by the project opponents, see *Robertson v. Methow Valley Citizen Council,*

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[3] There are, to be sure, legal obligations that no party has standing to enforce, see *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1974), but this case does not involve a "generalized grievance" common to all or many citizens, *Flast v. Cohen,* 392 U.S. 83, 106 (1968), and it is unrealistic to expect the "political processes," *Reservists Committee,* 418 U.S. at 227, to stand as the exclusive check on administrative intransigence of this kind. On the contrary, Congress expressly authorized federal courts to compel agencies to take action, at the behest of aggrieved parties like Petitioners. See 5 U.S.C. 702, 706(1).